

RECEIVED
MAY 06 2005
DEPARTMENT OF
WATER RESOURCES

KATHLEEN MARION CARR
Office of the Field Solicitor
550 W. Fort Street, MSC 020
Boise, Idaho 83724
Telephone: (208) 334-1911
Facsimile: (208) 334-1918

For the U.S. Department of the Interior, Bureau of Reclamation

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS
HELD BY OR FOR THE BENEFIT OF A&B
IRRIGATION DISTRICT, AMERICAN
FALLS RESERVOIR DISTRICT #2,
BURLEY IRRIGATION DISTRICT,
MILNER IRRIGATION DISTRICT,
MINIDOKA IRRIGATION DISTRICT,
NORTH SIDE CANAL COMPANY, AND
TWIN FALLS CANAL COMPANY

**RECLAMATION'S PROTEST
TO IDAHO GROUND WATER
APPROPRIATORS' INITIAL PLAN
FOR PROVIDING REPLACEMENT
WATER**

The U. S. Department of the Interior, Bureau of Reclamation (Reclamation),¹ by and through its attorney Kathleen Marion Carr, Office of the Field Solicitor, pursuant to IDAPA 37.01.01.250 hereby files its protest in the above-captioned contested case to the Idaho Ground Water Districts' (IGWA) Replacement Water Plan. As described herein, Reclamation is willing to accept the initial 27,700 acre feet of "replacement water" for the 2005 season only, but it objects to the rest of the submitted plan on the basis that the proper procedure to consider a replacement plan and mitigation credits is under the Conjunctive Management Rules through a

¹ Reclamation's address is 1150 North Curtis Road, Suite 100, PN-3100, Boise, ID

submitted mitigation plan. Reclamation does not waive its right to contest the Director's determination of the legal and factual basis for the replacement water in other proceedings.

BACKGROUND

On January 14, 2005, the seven irrigation districts, reservoir district, and canal companies named in the caption and referred to as the Surface Water Coalition (Surface Coalition) made a water delivery call to which the Director responded and issued an Order on April 19, 2005, and Amended Order on May 2, 2005 (Amended Order).

On February 8, 2005, IGWA filed a proposed mitigation plan with the Director pursuant to Rule 43 of the Idaho Department of Water Resources' (IDWR) Rules of Conjunctive Management in a separate case than that of the surface water call. On March 21, 2005, Reclamation filed both a protest to the Mitigation Plan and a Motion to Dismiss the Mitigation Application. In response to Motion for a Continuance of the Hearing on the Mitigation Plan, on March 18, 2005, the Director granted the continuance.

Subsequently, the Director issued the Amended Order in the surface call proceedings. The Amended Order required IGWA to provide to the Director a plan of replacement water for at least 27,700 acre feet or other mitigation in lieu of curtailment by April 29, 2005. *Amended Order* at 46 ¶ 9, and 46 ¶ 5. The Director stated that he intended to act on the plan on or about May 6, 2005, or as soon thereafter as practicable. *Amended Order* at 46 ¶ 5.

Thus, in accordance with the Director's Amended Order IGWA filed its Initial Plan for Providing Replacement Water in this case on April 29, 2005.

CONTESTED POINTS

A. Whether the Director May Request a Replacement Water Plan in Lieu of an Approved Mitigation Plan Under the Conjunctive Management Rules

Reclamation asserts that the Conjunctive Management Rules provide only one process for the consideration of replacement water—through the submission of a mitigation plan. *See* IDAPA § 37.03.11.043. Therefore, the Director’s request for a replacement water plan in lieu of curtailment is contrary to IDWR’s promulgated rules. Nonetheless, it is Reclamation’s position, that it will not oppose the implementation of A(1) of the Replacement Water plan for this year. Reclamation reserves the right, however, to contest the legal and factual basis for the amount of replacement water needed in 2005 through a hearing on either the Amended Order or IGWA’s mitigation plan. Further, Reclamation does not waive its right to contest the legal and factual basis of future replacement water plans submitted either by IGWA or other junior water users.

B. Other Provisions in IGWA’s Replacement Water Plan are Inappropriate

Reclamation contests Subsection A(2) of Replacement Water Plan since it appears to be part of a larger effort that IGWA has undertaken to recharge the Thousand Springs reach due to the trout farm calls, and for which it wishes to receive credit in this proceeding. Reclamation contests Section B of IGWA’s Replacement Water Plan in regards to “Mitigation Credits” since it is not a foregone conclusion that credits can and should be given for either reach gains that may occur or other mitigation plans. These provisions are only appropriate, if at all, to be included in a mitigation plan, and only implemented after a hearing is held to determine when and how those credits and other measures should occur. *See* IDAPA § 37.03.11.043.03 (“Factors to be Considered” in Submission of Mitigation Plans).

**C. IGWA's Mitigation Plan is Not Appropriate
to Incorporate into a Replacement Water Plan.**

Reclamation also protests the incorporation of IGWA's Mitigation Plan into its Replacement Water Plan since this is inconsistent with the Director's Amended Order and the Conjunctive Management Rules. The act of incorporating a mitigation plan into a replacement water plan will effectively bypass the procedures enumerated in the Conjunctive Management Rules. Those procedures provide a process for the careful review of the various factors to be considered in processing a mitigation plan, they allow parties an opportunity to contest the submissions under these factors, and they provide an opportunity for a hearing where the Director may consider both sides of the argument as provided under I.C. § 42-222. *See* IDAPA 37.03.11.43.02. As a consequence, Reclamation opposes any incorporation of IGWA's Mitigation Plan into its Replacement Water Plan since it will occur without benefit of these procedures.

Furthermore, because of IGWA's request to incorporate its Mitigation Plan into its Replacement Water Plan, Reclamation hereby renews and incorporates its Motion to Dismiss Mitigation Application or in the Alternative to Request Hearing to Be Reset that it filed *In the Matter of Ground Water Districts' Application for Approval of Mitigation Plan For the American Falls Reach of the Snake River* (March 21, 2005) into this filing for the reason set forth therein.

CONCLUSION


The Director must act in compliance with his Conjunctive Management Rules. The Conjunctive Management Rules do not contemplate the requirement of a replacement water plan except in the context of an approved mitigation plan. Reclamation recognizes that IGWA has prepared a plan within a limited time frame and in an attempt to comply with the Director's Amended Order, and as such it will not oppose the implementation of the Replacement Water Plan subsection A(1) of the 27,700 acre feet for the 2005 as explained above.

**RECLAMATION'S PROTEST TO IDAHO GROUND WATER APPROPRIATORS'
INITIAL PLAN FOR PROVIDING REPLACEMENT WATER**

Relief Requested

1. Reclamation requests that its protest be granted against the Replacement Water Plan to the extent the Director approves any of IGWA's plan beyond implementation of A(1) for the 2005 water year.
2. Reclamation renews its Motion to Dismiss IGWA's mitigation plan, and seeks to require IGWA to refile it to include all the necessary information required by the conjunctive management rules.

Dated this 6 day of May, 2005.

A handwritten signature in cursive script, reading "Kathleen Marion Carr". The signature is written in black ink and is positioned above the printed name.

KATHLEEN MARION CARR

CERTIFICATE OF SERVICE

The undersigned certifies that on the 6TH day of May 2005, a true and correct copy of **RECLAMATION'S PROTEST TO IDAHO GROUND WATER APPROPRIATORS' INITIAL PLAN FOR PROVIDING REPLACEMENT WATER** was served on the following person(s) as shown below:

Director, Karl J. Dreher
Idaho Department of Water Resources
 322 East Front Street
 P.O. Box 83720
 Boise, ID 83720-0098
By Hand Carry and Facsimile
(208) 287-6700

John K. Simpson
Barker Rosholt & Simpson, LLP
 P. O. Box 2139
 Boise, ID 83701-2139
By U.S. Mail and Facsimile
(208) 344-6034

W. Kent Fletcher
Fletcher Law Office
 P. O. Box 248
 Burley, ID 83318
By U.S. Mail and Facsimile
(208) 878-2548

Roger Ling
Ling Robinson & Walker
 P. O. Box 396
 Rupert, ID 83350
By U.S. Mail and Facsimile
(208) 436-6804

Jeffrey C. Fereday
Michael C. Creamer
Givens Pursley, LLP
 P. O. Box 2720
 Boise, ID 83701
By U.S. Mail and Facsimile
(208) 388-1300

James S. Lochhead
Adam T. DeVoe
Brownstein Hyatt & Farber, P.C.
 410 17th St., 22nd Floor
 Denver, CO 80202
By U.S. Mail and Facsimile
(303) 223-1111

James Tucker
Idaho Power Company
 1221 W. Idaho St.
 Boise ID 83702
By U.S. Mail and Facsimile
(208) 388-6935

Scott L. Campbell
Moffatt Thomas Barrett Rock & Fields, Chtd
 P. O. Box 829
 Boise, ID 83701
By U.S. Mail and Facsimile
(208) 385-5384

C. Thomas Arkoosh
Arkoosh Law Office, Chtd.
 P. O. Box 32
 Gooding, ID 83330-0032
By U.S. Mail and Facsimile
(208) 934-8873

Idaho Department of Water Resources
Eastern Region Office
 900 N. Skyline Dr.
 Idaho Falls, ID 83402-6105
By U.S. Mail and Facsimile
(208) 525-7177

Josephine P. Beeman
Beeman & Associates, P.C.
 409 West Jefferson Street
 Boise, ID 83702
By U.S. Mail and Facsimile
(208)331-0954

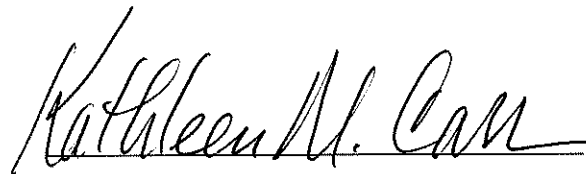
Michael S. Gilmore
Deputy Attorney General, State of Idaho
 Statehouse, Room 210
 Boise, ID 83720
By U.S. Mail and Facsimile
(208) 334-2830

RECLAMATION'S PROTEST TO IDAHO GROUND WATER APPROPRIATORS'
INITIAL PLAN FOR PROVIDING REPLACEMENT WATER

Idaho Department of Water Resources
Southern Region Office
1341 Fillmore St., Ste. 200
Twin Falls, ID 83301-3033
By U.S. Mail and Facsimile
(208) 736-3037

Sarah A. Klahn
WHITE & JANKOWSKI, LLP
511 16TH Street, Suite 500
Denver, CO 80202
By U.S. Mail and Facsimile
(303) 825-5632

U.S. Bureau of Reclamation
E. Gail McGarry, PN-3100
1150 N. Curtis Road
Boise, ID 83706-1234
By U.S. Mail and Facsimile
(208) 378-5305

A handwritten signature in black ink, reading "Kathleen M. Carr". The signature is written in a cursive style with a horizontal line underneath the name.

KATHLEEN MARION CARR